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In the
Supreme Court of the
United States

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER;
FRANCES GORDENKER,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

For a Merits Brief
On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF DONALD L. HARKINS, CONCERNED MICHIGAN PROPERTY OWNER IN SUPPORT OF THE PETITIONERS

WILLIAM J. REISDORF (P28570)
189 E. Big Beaver Road, #205
Troy, MI 48083
(248) 689-6996

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the rules of this Court, Donald L. Harkins moves for leave to file the accompanying merits brief in support of the petitioner. Due to the last minute filing of this brief, neither the petitioner nor the respondent has consented to the filing of this brief although both parties are receiving copies of this filing at the same time as the Court.

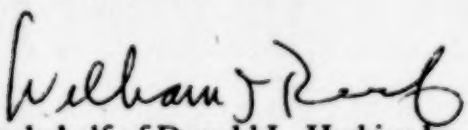
The issue presented is whether or not the Army Corp of Engineers have jurisdiction over Petitioners' property under the Clean Water Act. Harkins' interest in this case is purely in the interest of justice in that he believes that both the trial court and the appellate courts have allowed the Army Corp of Engineers (herein Corps) to redefine the term "waters of the United States" in an unlawful matter which would expand the Corp's jurisdiction under the Clean Water Act to include almost all "public lands of the United States".

Under Rule 37.1 of the rules of this Court, This Honorable Court should favor the filing of the accompanying brief since it brings to

the attention of the Court relevant matters not already brought to its attention by the parties and may be of considerable help to the Court.

Harkins prays this Honorable Court will grant his Motion for leave to file the accompanying brief in support of Petitioner so that these relevant matters can be heard.

Respectfully Submitted,



On behalf of Donald L. Harkins by

WILLIAM J. REISDORF (P28570)

189 E. Big Beaver Road, #205

Troy, MI 48083

(248) 689-6996

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INTEREST OF *AMICUS CURIAE* [‘]

Amicus curiae, Donald L. Harkins, is a resident of the State of Michigan and a citizen of the United States. His interest in this case is purely in the interest of justice in that he believes that both the trial court and the appellate courts have allowed the Army Corp of Engineers (herein"Corps") to redefine the term "waters of the United States" in an unlawful matter which would expand the Corp's jurisdiction under the Clean Water Act to include almost all "public lands of the United States". Furthermore, Harkins seeks to eliminate the unfair double layer of regulation by the State of Michigan and then the Corp which for practical purposes are mirror images of each other and require the land owner to meet similar burdens in order to obtain permits. Amicus curiae (hereinafter "Harkins") seeks a ruling in this matter which would protect the titles and vested property interests of millions of United States land owners.

[‘] Pursuant to Rule 37.6 of the Rules of this Court, amicus curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, a private citizen, or his counsel, has made a monetary contribution to the preparation or submission of this brief.

FACTUAL SUMMARY

Petitioners, June Carabell, Keith Carabell, Harvey Gordenker and Frances Gordenker (collectively, "Carabells") own 19.61 acres of property in Chesterfield Township, Macomb County, Michigan. Since 1987, the Carabells have submitted various permit proposals to the Michigan Department of Environmental Quality (herein MDEQ) in order to construct a multi-family condominium development of their property. Their original proposal was for 200 units. Pursuant to a MDEQ Final Determination and Order, in November, 1998 a permit was issued to build a 112 unit alternative condominium development and required Petitioners to replant and restore 3.74 acres of wetland. The reduction in size of the project from 200 units to 112 units and reduction in fill of 15.87 acres down to approximately 12 acres was required under Michigan's Wetland Protection Act (M.C.L. 324.101) in order to reduce the environmental impact down to a level where there would be no unacceptable impact on the natural resources of the State.

The Army Corp of Engineers (herein "Corps") did not agree with the MDEQ's Final Determination and Order and notified the

Carabells that they also have jurisdiction over their property under the Clean Water and Air Act (herein CWA) and that they would have to apply for a permit to discharge fill into the "waters of the United States".

On August 23, 1999, the Corps received a permit application from the Carabells. AR Vol 1, Doc. 2. The Carabells essentially requested that the Corps approve the MDEQ permit. On October 5, 2000, the Corps sent the Carabells a letter denying the permit along with summary findings. AR Vol. 1, Doc 76. Harkins suggests to the Court that it is not necessary to elaborate on the reasons for the Corps permit denial. This is because this appeal is limited to the determination of whether or not there is jurisdiction under CWA not whether Corps' denial was arbitrary or capricious.

The Carabells then sought Administrative Appeal of the federal permit denial before both the US District Court in Detroit and the United States Court of Appeals for the Six Circuit. These appeals both upheld the Corps' denial. On October 11, 2005, this Honorable Court granted Certiorari to hear Petitioners' appeal

ARGUMENT I

The Clean Water Act **does not** extend to wetlands that are hydrologically isolated from any of the "waters of the United States".

ARGUMENT II

The limits on Congress' authority to regulate Interstate commerce **preclude** an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States".

COMBINED LEGAL AND FACTUAL ANALYSIS

The question of jurisdiction in this matter presents a mixed question of fact and law. Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(a) requires landowners to obtain permits from the Corps before they discharge fill material into "navigable waters". Congress has defined "navigable waters" as "waters of the United States", including the territorial seas." 33 U.S.C. 1362(7). The Conference Report which accompanied the CWA included the statement that the conferees "intend that the term 'navigable waters'

be given the **broadest constitutional interpretation."** S. Conf. Rep. No. 92-1236, at 144 (1972). 1

In *United States v. Riverside Bay View Homes, Inc.* , 474 U.S. 121 (1985) The Court held that "the language, policies and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other "waters of the United States." pp. 131-139. As a result of this ruling, the EPA and the Corps have redefined "water of the United States" 33 C.F.R. 328.3(a 11-13-86 to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction.....

In the Corps' 1974 regulations, Section 404(a) defined "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1).

(4) All impoundments of water otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Armed with this new definition of "waters of the United States", the Corps has determined that Carabells' State Permitted Activity of filling approximately 12 acres of wetlands requires a federal permit since the activity discharges fill material into " navigable waters" or onto "land beneath navigable waters".

In making the determination that Carabells' property is included within the definition of "waters of the United States" the Corps apparently relied upon the following facts. (reading from the Sixth Circuit Court of Appeals' opinion page 1):

"In prehistoric times, this property was submerged under Lake St. Clair. As the lake receded over time, some areas of the Carabells' property remained covered by wetlands. Today, the property–located one mile northwest of Lake St. Clair....".

Carabells' property is no longer adjacent to or contiguous to Lake St. Clair as demonstrated by the fact that it is separated from the lake by one mile of numerous residential subdivision developments. (Pg 2. Carabells' C of A Brief). In order to gain jurisdiction over Carabells' property, the Corps has determined under 33 C.F.R. 328.3(a)(5), that Carabells' property is some how (however remotely) hydrologically connected to "navigable waters" because rain water runoff from his property might drain into Lake St. Clair. In summary, the Corps' position in that because Carabells' property may have been submerged land, perhaps in prehistoric times or more recently, and that his property was at some point in time "land beneath navigable water" of Lake St. Clair or one of its tributaries, it therefore is still part of "waters of the United States".

Amicus curiae (hereinafter "Harkins") brings to the attention of this Honorable Court that both the Supreme Court's decision in *Riverside Bay View Homes, Inc, supra,* as well as the EPA and Corps subsequent redefinition of "water of the United States" are inconsistent with definitions in other acts of Congress, the United States Code as well as case decisions of this Honorable Court, and

state appellate courts..

It is Harkins' position that the definition of "water of the United States' should be consistent under the CWA and the Submerged Land Act 43 U.S.C. 1301 (herein SLA). The SLA under 43 U.S.C. 1301(f) states;

> " the term "**lands beneath navigable waters" does not** include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and **if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;"**

This notion that only unpatented bottom land is within the jurisdiction of the United States is not a new concept. This Honorable Court on June 6, 2005 in *State of Alaska v. United States* 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005) decided a dispute as to whether title under certain submerged land was conveyed by the United States to the State of Alaska thereby using the definition of

"waters of the United States" under the SLA. Furthermore, *Executive Order 11990* entitled **Protection of Wetlands** signed by President Jimmy Carter, May 24, 1977 states; "This Order **does not apply to** the issuance by Federal agencies of permits, licenses, or **allocations to private parties for activities involving wetlands on non-Federal property**. It is undisputed that title to Carabells' property was conveyed either by State or Federal patent. It makes no difference whether the Federal Government gave title directly to Carabells' predecessors in title or gave it the State of Michigan who in turn gave title to Carabells' predecessors. The Carabells were able to obtain title to such land.

> "Upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *Ozark-Mahoning Co. v State*, pg 490 37 N. W. 2d 488 citing *United States v. Oregon*, 295 U.S. 1, 55 S.Ct.

610, 615, 79 L.Ed. 1267 April 1, 1935

"The question of whether waters within a state are navigable at the time of the state's admission to the Union is a Federal Question. If such waters in a state are not navigable in fact at time of its admission to the Union, the title of the United States to lands underlying such waters remain unaffected." Id.

The record is clear that the Carabells own the 19.61 acres upon which they seek to develop. The determination of whether the Carabells are heirs and assigns of the original purchaser of a state patent (assumes land under navigable water at statehood) or a federal land (assumes land was under non-navigable water at statehood) is not important. It is only important to note that it came from either a state sovereign or a federal sovereign.

In either event the United States gave up its rights to the land for which title passes. Under *Ozark-Mahoning*, "the rights of the grantee under patents issued by the United States government are fixed and vested as of the dates of the patents." In cases where the lands were transferred to the State, 43 U.S.C. 1314 limits the rights and powers retained by the United States to that of purchase of the

natural resources if they can or condemnation of lands if they must. Specifically under SLA 43 U.S.C. 1311 (2) "the rights and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States....."

It is the Corps' position that the lands Carabells now own were once under Lake St. Clair. Under SLA, these lands would be exclusive jurisdiction of the State. Harkins suggests an example of this law is action is where a natural resource such as oil or gold is discovered under lands upon which the federal government has transferred title to the State, under 43 U.S.C. 1311 (2) the Federal government has no interest in the natural resource. (Except buy or condemnation) The fact the property was conveyed to Carabells or other private parties would have no effect. Now assume that waters recede under the Corps' theory and another Natural Resource Wetlands are created, the Corps newly created definitions of "waters of the United States" now would allow them to come in and regulate. This new definition may also allow them to come forward and claim

the oil and gold in our example.(note, prior to the enactment of 33 C.F.R. 328.3(a), the Corps had no jurisdiction over Carabells' property) Such a result would be repugnant to the SLA and divest the States and Carabells of vested rights through the application of an ex post facto definition of "waters of the United States". The Corps is using this new definition as well as the decision in *Riverside Bay View Homes, Inc., supra,* to change long standing principles of property law.

In the *Riverside Bay View Homes, Inc, supra,* this Court allowed a decision to stand which allows the Corps to regulate wetlands that are adjacent to "water of the United States". A year earlier in 1984, In *Summa Corporation v. California*, 466 U.S. 198, 80 l Ed 2d 237, however, the Supreme Court ruled that a lagoon whose title was confirmed by federal patent to original grantees was held not subject to public trust easement. *Summa Corporation* demonstrates clearly that patented land under water **are not** "waters of the United States." Furthermore, the State of California was prevented from placing a "Public Trust Easement" against the private landowners. Now twenty-one years later, the Corps is being granted jurisdiction over

property which they conveyed either directly or indirectly (through the State) by means of a retro-active change in the definition of "waters of the United States". The net result is that the Corps is being allowed by the lower court decisions to place a "Public Trust Easement" which was not confirmed in the patent process against the Carabells' property. This "public trust easement" requires the Carabells' to leave their property in its natural state and eliminates vested property development rights previously granted by the State of Michigan. Under the "equal footing doctrine", if the State of California can't enact a new law creating a "public trust easement" against private property, neither can the United States Congress or its agencies such as the "Corps." As stated on remand from the Supreme Court, *Summa and Los Angeles v Venice Peninsula Properties*, 205 Cal. App.3d 1522, 253 Cal.Rptr. 331 pg 335, states; "the patent of the government is evidence of title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of **any interest of the United States ..."**

In *Riverside Bay View Homes, Inc., supra*, the record is unclear

as to whether the wetlands adjacent to "navigable waters" of Lake St. Clair were unpatented bottom lands or lands previously conveyed directly or indirectly by the United States. This may account for the very "unusual" ruling in *Riverside Bay View Homes, Inc., supra.* It is Harkins' position that if the land was in fact conveyed under federal patent, then the principles of *Summa and Los Angeles v Venice Peninsula Properties, supra* would apply which would have prevented any Corps jurisdiction. This is because the United States already transferred all rights and interest in the subject property. There was no need for a redefinition of "waters of the United States" because the definition under 43 U.S.C. 1301 is part of a long standing regulatory system under the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands."

Under Michigan law, In the Michigan Supreme Court decision *Oliphant v. Frazho*, 381 Mich 630, the State of Michigan was estopped from preventing a private land owner (claiming title from a U S patent) from filling land under Lake St. Clair which was conveyed to him by the patent.

The application of the newly defined term "waters of the United States" under 33 C.F.R. 328.3 to the Carabells' property represents a sudden change in the bundle of rights granted Michigan property owners under Michigan Law. In *Hughes v. State of Washington* 88 S. Ct. 438 (1967) pg. 296 the Supreme Court notes:

> "to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple asserting retroactively that the property it has taken never existed at all."

It is Harkins' position that the words "State" and "Corps" are interchangeable and the Corps' application of definitions in 33 C.F.R. 283.3 to Carabells' property retroactively asserts that the **vested property rights which it denies** never existed at all.

Under Michigan law, In *Klais v. Danowski* 373 Michigan Reports 262, (1967) pg 272, the Michigan Supreme Court noted:

> "It is settled law in this country that lands underlying

navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to paramount power of congress to control such waters for the purposes of navigation."

Under Michigan law it **would not** have been unlawful for the State of Michigan to have sold Carabells' property to his predecessors in title. This is based upon the fact that the property serves no navigational benefit to interstate commerce because it is located one mile from the nearest body of navigable water and without any navigable connection. Furthermore, *Klais, supra*, pg 276 it states:

"the question is raised whether the patentees and **those claiming under them have lost from the then dry lands originally patented** to them title to so much of the private claims as, subsequent to the date of the patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative.....The Michigan State legislature seems to have recognized a distinction between patented and unpatented lands..."

The Carabells have a vested right to restore their property back to dry land and never lose title should it become submerged due to erosion or rising lake levels. Even though the Carabells had a right to restore their property back to dry land, this right under Michigan Law is subject only to the State's police power to regulate public health, safety and welfare. Carabells' vested rights were perfected during the State of Michigan's permit process. The MDEQ's Final Determination and Order, 9-30-99 is a validation of his vested development rights.

This order mandated that the Carabells downsize their proposed development and be granted a permit allowing them to develop the property according to the MDEQ's alternative plan which minimized any unacceptable environmental harm to the eco-system.

In *Summa, supra,* at pg336, the Court states on the issue of allowing a public trust easement to be placed upon Summa's property:

"It is difficult for us to see how the patent can be described as settling in the grantee a full and **complete** title, while at the same time holding that it was burdened by a servitude of the magnitude of

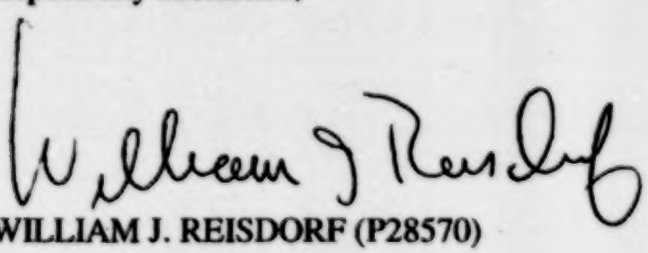
that asserted by the State in this action." The result of allowing the Corps to use its newly created definition of "waters of the United States" under 33 C.F.R. 328.3 to gain jurisdiction over Carabells' property also unreasonably places burdens on Carabells' property which were not part of the patent process and title. Once the federal government gave up title, the Corps was estopped from interfering just as the State of Michigan was in *Oliphant, supra.*.

CONCLUSION

For reasons stated above; the Corps' new definition of "waters of the United States" under 33 C.F.R. 328.3 is illogical and conflicts with other definitions under Title 43 of the Public Lands and the Act of Congress of 1820, An Act making further provision for sale of the Public Lands. These definitions under 33 C.F.R. 328.3 are repugnant to Congress' regulatory scheme for sale of federal land and aversely affect the property titles of millions of U.S. property owners. This Honorable Court should find that these definitions exceed Constitutional limits and are therefore unenforceable. *Amicus Curiae*, Harkins, would ask this Honorable Court to substitute the long standing definition of "waters of the United States" and

recognize that such definition does not include land which the United States has already conveyed to the general public. Furthermore, Harkins would ask this Honorable Court to find the Corps has no Jurisdiction under CWA over Carabells' property.

Respectfully submitted,



WILLIAM J. REISDORF (P28570)

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Troy, Michigan 48083

(248) 689-6996